

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC SOUND RESOURCES, a Washington
non-profit corporation; and THE PORT OF
SEATTLE, a Washington municipal corporation;

Plaintiffs,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY, a Delaware
corporation; J.H. BAXTER & CO., a California
limited partnership; J.H. BAXTER & CO., a
California corporation; and J.H. BAXTER & CO.,
INC., a California corporation.

Defendants.

No. C04-1654L

**PACIFIC SOUND RESOURCES'
REPLY TO BNSF'S OPPOSITION TO
MOTION FOR RECONSIDERATION
OF ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT**

BNSF invoked this Court's jurisdiction by removing the case from state court based on diversity jurisdiction. Plaintiffs did not contest the removal since there was obvious diversity of citizenship. Fifteen months and \$1,000,000 in attorneys fees later,¹ BNSF filed a motion asking this Court to dismiss for lack of Article III standing, which is a jurisdictional issue. Having obtained the relief it sought, BNSF now asks the Court to rule that 28 U.S.C. § 1447(c) does not mean what it says, that the Court has a mandatory duty to remand the case to state court when the case has been dismissed for lack of subject matter jurisdiction.

¹ Plaintiffs are in the process of responding to BNSF's motion for attorneys fees and costs. If the Court grants plaintiffs' Motion for Reconsideration and remands the case, it need not resolve the attorneys fees issue since BNSF would not be the prevailing party. Which party is entitled to fees would be determined after the case is resolved in state court.

1 BNSF's arguments are not persuasive. BNSF contends that the Court should not
 2 remand the entire case since there are "a number of claims" left in the case, yet it fails to point
 3 to any claim still pending. The Port's claims have been dismissed, as have PSR's, and BNSF's
 4 counterclaims are expressly derivative of plaintiffs' claims. There are no claims currently
 5 pending that need to be resolved by the Court.

6 BNSF creates a phantom conflict between diversity jurisdiction under 28 U.S.C. §
 7 1332(a) and 28 U.S.C. § 1447(c), which it contends prevents the Court from remanding.
 8 There is no case law supporting BNSF's position, which flies in the face of the mandatory
 9 language of § 1447(c). BNSF reads § 1332(a) as completely overriding § 1447(c). BNSF
 10 candidly admits that its interpretation would leave PSR without a remedy, since it cannot
 11 maintain its claims in federal court but also is prevented from litigating its state law claims in
 12 state court, where it brought them. BNSF contends that diversity of citizenship trumps
 13 PSR's right to have its claim heard at all. Principles of federalism should not allow such
 14 gamesmanship, so BNSF's objections to remand should be rejected.

15 **A. This Motion Is a Motion for Reconsideration, Not a Motion to Alter or**
 16 **Amendment the Judgment Under Rule 59(e).**

17 BNSF argues that because PSR filed this motion after the clerk entered judgment, it
 18 should be treated as one to alter or amend the judgment under Federal Rule of Civil Procedure
 19 59(e) rather than as one to reconsider. However, BNSF ignores the fact that a party may seek
 20 reconsideration "within ten judicial days following the order to which it relates." *See* Local
 21 Rule W.D. Wash. CR 7(h)(2). PSR's filing was timely, as the Court noted in its request for
 22 further briefing. By casting this as a motion to alter or amend the judgment, BNSF tries to
 23 change the standard of review and deny PSR a right expressly granted under the local rules.
 24 The Court should reject BNSF's argument. The fact that a judgment was entered before the
 25 period for motions for reconsideration had expired should not affect plaintiffs' substantive
 26 right to seek the Court's review of its order of dismissal.

B. Section 1447(c) Requires this Court to Remand to State Court.

BNSF presents two arguments, neither of them persuasive, why the Court should not interpret § 1447(c) to require remand: first, because § 1447(c) allows remand only when the Court lacks subject matter jurisdiction over an entire case, while here the Court retains jurisdiction over “a number of claims other than those asserted by PSR” (BNSF Opp’n at 6); and second, because remand would undermine its “right” to a federal forum.

While BNSF is correct that claims other than PSR’s were asserted in this action, all have been resolved. The Port asserted claims against defendants, and defendants asserted counterclaims that they admit are “essentially derivative” of plaintiffs’ claims. *Id.* Because this Court dismissed the Port’s claims and lacks jurisdiction over PSR’s claims, there is nothing from which BNSF’s claims can derive, and thus nothing left for this Court to decide.²

The cases that BNSF cites in support of its theory that a court may remand only an “entire case” involve lawsuits in which claims remain to be resolved after one or more claims are dismissed for lack of subject matter jurisdiction. In those cases, the question is whether the federal court will retain jurisdiction or will remand to state court to resolve the claims. That is not the question here. Rather, the question is whether PSR’s claims will be resolved in any forum. Since the Court has ruled that PSR lacks Article III standing, PSR cannot proceed in federal court. State court is its only option, and § 1447(c) requires that PSR’s claims be remanded for consideration there.

In the alternative, BNSF argues that even if § 1447(c) authorizes remand of individual claims in some cases, it does not do so in cases founded on diversity jurisdiction. BNSF argues that the provisions of 28 U.S.C. § 1332(a) give it an absolute right to a federal forum, whether or not PSR’s claims can be heard in that forum. In other words, BNSF contends not only that § 1447(c) does not require remand, but § 1332(a) prohibits remand.

The few diversity cases considering § 1447(c) support PSR’s request for remand. For example, in *Coyne v. American Tobacco Co.*, 183 F.3d 488 (6th Cir. 1999), a diversity

² BNSF is free to refile its CERCLA claim in federal court if it is found liable in state court.

jurisdiction case, the Sixth Circuit relied on § 1447(c) in deciding to remand remaining claims to state court after determining that plaintiffs lacked Article III standing—even though the remand order denied defendants their preferred federal forum.

Other federal courts also have rejected BNSF’s premise, that federal courts *must* provide a forum for defendants who assert diversity jurisdiction. For example, in *Trask v. Kasenetz*, 818 F. Supp. 39 (E.D.N.Y. 1993), *reversed on other grounds sub nom. Turkish v. Kasenetz*, 27 F.3d 23 (2d Cir. 1994), the court determined that plaintiff’s RICO claim was not viable. It then had to decide whether to retain or remand the remaining state law claims. Although defendants had removed the case based on the RICO claim, the court considered whether it could retain jurisdiction over the state claims based on diversity. The court wrote that, assuming all parties were of diverse citizenship:

it should not be compelled to exercise jurisdiction based upon diversity of citizenship....

...

No provision of the Judiciary Act compels this court to retain jurisdiction over a case removed by citizens of this state based upon a federal claim that has been dismissed, even where the parties are citizens of different states. The underlying logic of the statutory scheme suggests, to the contrary, that the court should remand the case to the New York State court in which plaintiff first chose to bring it. Moreover, that court would have greater familiarity and interest in the issues that remain insofar as they relate solely to the regulation of a New York State not-for-profit corporation.

Therefore, the court declines to exercise jurisdiction over the remaining claims. As a matter of economy, convenience, fairness, and comity the case is remanded to the state court pursuant to 28 U.S.C. §1447(c).

Id. at 44–45. *See also Woolf v. Mary Kay Inc.*, 176 F. Supp. 2d 654, 659 (N.D. Tex. 2001) (ordering remand to state court after federal claim was dismissed, noting that “this court is not compelled to exercise jurisdiction based on diversity of citizenship”).³ BNSF’s right to invoke

³ BNSF also argues that, before remanding any claims under § 1447(c), federal courts first dismiss the claim over which they lack subject matter jurisdiction. However, the cases it cites as authority for this argument involve claims that could not be heard in state court—for example, because the federal defendant had not waived sovereign immunity. *See, e.g., Fent v. Okla. Water Res. Bd.*, 235 F.3d 553 (10th Cir. 2000); *State of Nebraska v. Benton*, 146 F.3d 676 (9th Cir. 1998). Here, however, while PSR’s claims cannot be heard in federal court, they may be—and PSR believes they are—fully viable in state court. *See Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 88-89, 111 S. Ct. 1700 (1991) (“plaintiff’s lack of Article III standing would not necessarily defeat its standing in state court”).

the Court’s diversity jurisdiction overrides neither the Court’s mandatory duty to remand nor PSR’s right to have its claims adjudicated in some forum.

C. State Courts Should Decide Whether PSR Has Standing Under State Law.

BNSF asks this Court to consider whether PSR has standing under state law, basing its request on some passing comments made about Washington law in its summary judgment motion.⁴ The Court should decline this invitation because the issue has not been presented.

According to BNSF, it raised the issue whether PSR has standing under Washington law in its summary judgment motion, but PSR “failed” to respond. This is incorrect. The issue that BNSF raised in its summary judgment motion was whether PSR lacked standing under federal law. *See* BNSF’s Motion for Summary Judgment at 18–20. Citation of a handful of Washington cases in an argument over federal court standing does not convert the argument into a request for a ruling under state law. PSR had no reason to brief, and the Court had no reason to consider, whether PSR has standing in state court. Nor is there any need for the Court to decide the result under state law now, especially since it lacks subject matter jurisdiction over PSR’s claim.

D. The Court Should Not Enter Judgment for BNSF on the Port’s Claims or Modify its Summary Judgment Order Against PSR.

Finally, BNSF argues—on page 14 of a brief with a 12-page limit—that if the Court remands, it should enter judgment for BNSF on the Port’s claims. BNSF offers no authority for this request. Moreover, BNSF’s fear that the Port would try to relitigate the summary judgment ruling in state court is unfounded. *See Essington Metal Works, Inc. v. Ret. Plans of Am., Inc.*, 609 F. Supp. 1546, 1551 n.3 (E.D. Pa. 1985) (rejecting defendants’ argument that they would be prejudiced by remand to state court after federal court had made substantive rulings in their favor; federal court noted that defendants “presented no legal support for this

⁴ Although it does not ask the Court to rely on a “futility” exception, BNSF nevertheless contends that the Ninth Circuit recognizes such an exception. However, BNSF does not mention that the Circuit Court has applied this exception only where there is “absolute certainty” that remand would prove futile. *See Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991). That test is not met here.

position,” and concluded that “it is not clear that a state court on remand would reopen this court’s determinations on issues of state law”).

There are practical reasons why the Court should not enter judgment against the Port. It would require the Port to appeal to the Ninth Circuit while PSR’s claims are remanded to the state court. From the beginning, plaintiffs have sought to litigate their claims in one forum. For that reason, they brought only state law claims in state court. It was the King County Superior Court’s decision, since reversed, that split the case in two. Nor is there any basis for modifying the Court’s summary judgment order as BNSF suggests. BNSF claims that it “should be entitled to seek a state court determination” on issues this Court resolved in PSR’s favor (BNSF Opp’n at 15), but it asked the Court to decide those issues. Having lost those issues on the merits, BNSF should not be allowed to relitigate them in state court.

Because this Court lacks subject matter jurisdiction over all remaining claims, 28 U.S.C. § 1447(c) requires the Court to remand the case to state court.

Dated: March 17, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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